IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1206

JAMES JUNIOR FINCH,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATE OF MONTANA, et al., AS *AMICI CURIAE* IN SUPPORT

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(Other States Joining Set Forth On Inside Cover)

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The following States, by their respective Attorneys General, join in the views expressed herein:

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Certain other interested States did not have an opportunity to fully examine the merits of the question presented prior to the printing of this *amici curiae* Brief in Opposition. The Office of the Clerk will be advised directly if they elect to join in the views expressed herein.

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AUTHORITY TO FILE BRIEF AS *AMICI CURIAE*

The State of Montana et al., file this brief as *amici curiae* in support of the petition for a writ of certiorari pursuant to the authority granted by Supreme Court Rule 42,4.

INTEREST OF *AMICI CURIAE*

The State of Montana claims ownership of the entire bed and banks of the Big Horn River within the Crow Indian Reservation. At the very least, the State of Montana owns property rights to low water mark in the Big Horn River at the location of the alleged offense. The decision of the court below refuses to recognize Montana's ownership of the Big Horn River, fails to recognize Montana's ownership in the Big Horn River to at least low water mark at the location of the alleged offense, and is patently in conflict with *Oregon*

v. *Corvallis Sand & Gravel Co.* (No. 75-567) ——U.S. ——, 50 L.Ed.2d 550 (1977); *United States* v. *Holt State Bank*, 270 U.S. 49 (1926); *State of Oklahoma* v. *State of Texas*, 258 U.S. 574 (1921); *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77 (1922); *United States* v. *Champlin Refining Co.*, 156 F.2d 769 (10th Cir., 1946), aff'd 331 U.S. 788 (1947).

Moreover, the decision of the court below, if allowed to stand, is almost certain to have far-reaching effects. The court relied upon certain boilerplate provisions in the Treaty of 1868 with the Crow Indians, which provisions are also found in a host of treaties with other Indian tribes and bands.[1] The Court below has held, in effect, that in the typical reservation situation, the tribe, and not the state, holds title to the bed of navigable waters. This is directly contrary to this Court's decisions holding that the United States will not dispose of the soil beneath navigable waters but will hold it in trust for a future state, except in unusual cases where there is a clear intent shown to the contrary. *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1969); *United States* v. *Holt State Bank*, 270 U.S. 49 (1926); *Shiveley* v. *Bowlby*, 152 U.S. 1 (1893); compare this court's recent decision in *Oregon* v. *Corvallis Sand & Gravel Co.*, ——U.S.——, 50 L.Ed.2d 550 (1977).

The likely result of allowing this decision to stand will be to eventually divest the individual states of title to the beds of countless navigable rivers and lakes throughout the western United States. As the present case illustrates, non-Indian fishing rights will be lost, even where, as here, access was from land held by the

[1] See note 6, *post*.

State specifically to facilitate use by its citizens of a river which was stocked and maintained by the State. In some cases, the right of non-Indians to go upon the waters will be lost. It is possible that the economically essential right of diverting water for irrigation will be lost to some holders of valid rights because their diversion mechanism will constitute a trepass upon tribal land, i.e., the bed of a stream. See Opinion below, Pet. for Cert., 16A. Indeed, an appropriate water right itself, being perfected and held under state law, may be of questionable validity once it is established that the right is to appropriate from a stream of which the state no longer holds title to the bed.

Finally, the decision below that the Crow Tribe received title by treaty in 1868 would apparently apply to all navigable waters within the larger former reservation that existed at that time, and would mean that title is presently retained by the Tribe notwithstanding several subsequent Acts providing for a cession and allotment of parts of the reservation. *Choctaw*, *supra*, at 641 (Douglas, J., concurring). This would be equally true for many other western reservations which are now substantially smaller than they were when treaties were signed. Thus, some states would be deprived of the ownership of the beds of most of the navigable waters within their borders.[2] This would virtually eviscerate the equal footing doctrine

[2] To give one example, the Treaty with the Sioux bands which created the Great Sioux Reservation, covering all of South Dakota west of the Missouri River was negotiated and signed at the same place and within one week of the Crow treaty construed below. It contained all of the provisions which the court below found to be determinative. 2 Kapp. 770, 774.

in these areas. In addition, the possible effects on the ability to exercise state water rights, or the validity of these rights, are of enormous consequence.

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QUESTIONS PRESENTED

1. Whether the mere establishment of an Indian reservation, with the usual assurances to the Indians thereon of exclusive use and occupancy, divests a subsequently admitted state of its constitutional right under the equal footing doctrine to hold title to the beds of navigable waters within its borders.

2. Whether a settled rule of patent construction which vests Montana with riparian ownership in a navigable river to at least low water mark can be overruled *sub silentio*.

SUPPLEMENTARY STATEMENT OF THE CASE

Amici adopts the statement as set forth in the petition supplemented by the following salient fact: The agreed Statement of Facts, upon which this case was decided by the lower courts, does not specify whether Finch's fishing line intruded upon the bed, bank or water of the Big Horn River below its low water mark.

REASONS FOR GRANTING THE WRIT

I. The Ruling of the Ninth Circuit Court of Appeals Violates the "Equal Footing" Doctrine Establishing Ownership of Navigable Bodies of Water in the Various States.

As this Court has observed, Congress has constantly acted upon the theory that navigable waters and the soils under them

> "***shall not be granted away during the period of territorial government; but, unless in case of of some international duty or public exigency, shall be held by the United States in trust for the future States***"
>
> *Shiveley* v. *Bowlby*, 152 U.S. 1, 49-50 (1894)

See also *Packer* v. *Bird*, 137 U.S. 661, 672 (1891). A disposal during the territorial period is

> "***not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain."
>
> *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926)

In *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1969), this Court found such a public exigency, based on the unique history of the federal government's dealings with the Choctaw and Cherokee Indians. *Choctaw*, *supra*, at 622-626. The court found the requisite "very plain" intent in the fact that the land was conveyed to the Indians in fee simple and in the treaty provision that the land would never be "embraced in any Territory or State." *Choctaw*, *supra*, at 634-635.

In the present case, the court below found a public exigency in the mere establishment of an Indian reservation. It found language of "very plain" intent in mere boilerplate provisions that were also placed in a host of other contemporaneous treaties.[3]

The court first discussed the Crow treaty of 1851, but noted that its terms "fall far short of constituting an express grant of all lands, including the beds of navigable streams." Opinion below, Pet. for Cert., 11A. It then turned to the Treaty of 1868.[4] The court relied almost exclusively upon two portions of Article 2 of that treaty for its holding that title to the bed was conveyed therein. These provisions guaranteed the Tribe "absolute and undisturbed use and occupation" and that "no person, except those herein designated and authorized to do so***shall ever be permitted to pass

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[3] See note 6, *post*.

[4] The court first noted that the purpose of the 1868 treaty was to reduce the size of the Tribe's territory, citing this as a similarity to the *Choctaw* case where treaties were entered into for the same purpose. The court ignored the fact that the treaties discussed in *Holt State Bank* were also for that purpose. *Holt State Bank*, *supra*, at 58.

over, settle upon, or reside in" the reservation.[5] This language was used in numerous other treaties with tribes such as the Navaho, Ute, Cheyenne, Sioux, Arapahoe, Kiowa, Comanche and Shoshoni.[6] It is not indicative of the kind of exceptional public exigency that was involved in *Choctaw, supra.* It merely indicates the establishment of an Indian reservation, as was done in *Holt State Bank, supra.* Compare *Minnesota* v. *Hitchcock,* 187 U.S. 373, 389 (1902). *(Holt* reservation was "a reservation within the accepted meaning of the term") with *Atlantic & Pacific Rr. Co.* v.

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[5] The Court also relied on Art. 11 of the treaty, setting forth the requirement for obtaining a future cession agreement from the Tribe, as showing that the United States "recognized the extensive ownership rights" of the Tribe. Similar recognition was shown in the *Holt State Bank* situation, in the Act of January 14, 1889, 25 Stat. 642, which required the Chippewas' consent to a cession. These provisions should be contrasted with the *Choctaw* situation where no future cession was contemplated. The provision for a future cession by the Tribe is thus a factor which places the present case in the category of *Holt State Bank* and many other reservations, rather than the exceptional situation of *Choctaw.*

[6] Treaty with the Navaho, 1868, 2 Kapp. 782; Treaty with the Utes, 1868, 2 Kapp. 765; Treaty with the Sioux bands, 1868, 2 Kapp. 770; Treaty with the Shoshoni and Bannock, 1868, 2 Kapp. 786-787; Treaty with the Cheyenne and Arapahoe, 1867, 2 Kapp. 760, 761; Treaty with the Kiowa and Comanche, 1867, 2 Kapp, 754, 755. Language nearly identical to that found in Art. 2 of all of these treaties and the Crow treaty is also found in numerous other treaties. See, *inter alia,* Treaty with the Klamath, Modoc and Snake bands, 1864, 2 Kapp. 865; Treaty with the Cheyenne and Arapahoe, 1865, 2 Kapp. 887, 888; Treaty with the Comanche and Kiowa, 1865, 2 Kapp. 892, 893.

All of the 1867 and 1868 treaties cited above also contained the provision regarding future cessions, found in Art. 11 of the Crow treaty, on which the court below also relied. See note 5, *supra.* This provision was recently considered by this court in *Rosebud Sioux Tribe* v. *Kneip,* ---U.S.--- (April 4, 1976), as it appeared in the 1868 Sioux treaty.

Mingus, 165 U.S .413, 435-436 (1897). *(Choctaw* reservation was "for most purposes***to be considered as an independent country'').

The facts in this case are totally inapposite to *Choctaw:*

1. The entire region which was originally made a part of the Crow Indian Reservation was not conveyed to the Crow Tribe.[7]

2. There were no assurances of self-government extended to the Crow tribe of Indians.

3. There were no pledges to the Crow that their new homeland would never be part of any state; and finally,

4. Fee simple title to the land was retained by the

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[7] The guarantees of tribal exclusivity which were persuasive in *Choctaw* are totally absent here. Instead of fee simple title only "use and occupation" were conveyed. Art. II, Treaty of May 7, 1868, 15 Stat. 650. Art. VI of the treaty contemplated allotment of lands to the Indians. *Id,* at 651. Subsequently, vast areas of land were ceded to the United States. Act of April 11, 1882, 22 Stat. 42; Act of July 10, 1882, 22 Stat. 157; Act of March 3, 1891, 26 Stat. 989; Act of February 12, 1889, 25 Stat. 660; Act of June 4, 1888, 25 Stat. 167; Act of April 27, 1904, 33 Stat. 352. Finally, on June 4, 1920, 41 Stat. 751, the Crow Allotment Act was passed and out of a total reservation land area of 1,554,253.87 acres, 1,209,949.18 acres have been allotted. *Federal and State Indian Reservations,* United States Department of Commerce; U.S. Government Printing Office, 1974, p. 271. By the same Act, the State of Montana received fee simple title to Sections 16 and 36 as school grant lands for a total of 45,011.72 acres. *Id,* 41 Stat. 756. Some of these school grant lands straddle the Big Horn River and encompass its bed and banks.

United States, and thus the Indian title was one of use and occupancy as opposed to fee simple.[8]

In *Holt State Bank*, this court rejected the contention that "merely assigning the lands to an Indian reservation prevented their passage to the State." *Choctaw*, Brief of United States, *amicus*, p. 21.

When Montana became a state in 1889,[9] the fee to the Big Horn River was owned by the United States. The rationale of *Holt* is that "under the constitutional principle of equality among the several states, the title to Mud Lake then passed to the state***if the bed had not already been disposed of by the United States." *Holt*, at 55.

This "constitutional principle of equality" upon which *Holt* was dependent has been given renewed vitality in *Oregon* v. *Corvallis Sand & Gravel Co., supra*. *Corvallis* holds that the State of Montana, upon its admission to the Union, received absolute title to the beds of navigable waterways within its boundaries:

> "Citing *Martin* v. *Waddell*, 16 Pet. 410, 10 L.Ed 997 (1842), the Court noted that the original States held the 'absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' How., at 229, 11 L.Ed 565. The Court then concluded:

[8] The "use and occupancy" title of the Crow is nearly identical to the title held by the Chippewas which was insufficient to convince this court to vest title in Mud Lake in that tribe. *United States* v. *Holt State Bank, supra; Minnesota* v. *Hitchcock*, 185 U.S. 373 (1902).

[9] Act of February 22, 1889, 25 Stat. 676.

> 'First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy***' *Id.*, at 230, 11 L.Ed 565.'
>
> *"In so holding, the Court established the absolute title of the States to the beds of navigable waters, a title which neither a provision in the Act admitting the State to the Union nor a grant from Congress to a third party was capable of defeating.*
>
> *"Thus under Pollard's Lessee the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress but by the Constitution itself."* **(Emphasis supplied)**
>
> ——U.S.——, 50 L.Ed2d at 560.

The Enabling Act admitting the State of Montana to the Union stated that it was "to be admitted into the Union on an equal footing with the original states."[10]

In *Cardwell* v. *American Bridge Co.*, 113 U.S. 205, 212 (1885), this court said:

> "The act admitting California declares that she is 'admitted into the Union on an equal footing with the original states *in all respects whatever.*' She was not, therefore, shorn by the clause as to navigable water within her limits of any of the powers

[10] Act of February 22, 1889, 25 Stat. 676.

which the original states possessed over such waters within their limits."[11]

The lower court completely disregarded the basic tenets established by this court in *Pollard's Lessee* v. *Hagan*, 3 How. 212 (1845), reconfirmed in *Corvallis* and predicated its decision upon a thin tissue of treaty language. But there is nothing in that treaty language which "approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy *(Corvallis, supra* of treating such lands as held for the benefit of the future state." (Parenthetical words inserted) *Holt* at 58-59.

II. The Decision Below Completely Ignores the Fact That the State of Montana Owns Title to At Least Low Water Mark.

The lower court's decision is dependent upon whether or not Finch went "on any land that belonged to any Indian or Indian tribe***and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States; or upon any lands of the United States that are reserved

[11] See also *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 9 (1887); *Escanaba* v. *City of Chicago*, 107 U.S. 678, 689 (1882); *Withers* v. *Buckley*, 20 How. 84, 92-93 (1857). As this court observed in *Ward* v. *Race Horse*, 163 U.S. 504, 16 S.Ct. 1078, "'(A) treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,' is elementary. *Fong Yue Ting* v. *United States*, 149 U.S. 698, 13 S.Ct. 1016; *The Cherokee Tobacco*, 11 Wall 621. In the last case, it was held that a law of Congress imposing a tax on tobacco, if in conflict with a prior treaty with the Cherokees, was paramount to the treaty." Thus, when Congress passed the Enabling Act admitting Montana to the Union on an "equal footing," that Act abrogated any treaty restrictions which would defeat Montana's sovereign equality.

for Indian use***.[12] Assuming, *arguendo*, that the Big Horn River falls within the scope of 18 U.S.C., Section 1165, and assuming, *arguendo*, that the Crow tribe owns the bed of the river, that ownership is restricted to low water mark. There is no fact in the record from which one can conclude that Finch's fishing line intruded below low water mark. If Finch's fish line did not intrude into the water below low water mark, he was not upon Indian land nor did his actions fall within the scope of 18 U.S.C., Section 1165; thus, the lower court's decision must be reversed.

No rule is more firmly entrenched in federal jurisprudence than the principle that federal grants-patents to tribal-reservation land are to be construed according to the laws of the state in which the Indian lands are located. *State of Oklahoma* v. *State of Texas*, 258 U.S. 574, 594-595, 598 (1921); *Brewer-Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77, 88-89 (1922); *United States* v. *Champlin Refining Co.*, 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788-789 (1947); *United States* v. *Oklahoma Gas & Electric Co.*, 318

[12] 18 U.S.C., Section 1165; *United States* v. *Finch*, Pet. App. A, P. 7A.

U.S. 206, 209-210 (1942); compare *Whitaker* v. *McBride*, 197 U.S. 510 (1904).[13]

In *United States* v. *Champlin Refining Co.*, *supra*, 156 F.2d, at 773, the rule of construction was applied to navigable waters:

> "Grants by the United States of its public lands bounded on streams or other waters, *navigable or non-navigable*, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. As regards such conveyances, the United States assumes the position of a private owner, subject to the general law of the state. *Where it is disposing of tribal lands of Indians under guardianship, the same rule applies.*"[14] (Emphasis supplied)

[13] The rule articulated in the cited cases has been consistently applied in similar controversies – some involving former Indian lands. See, e.g., *Hardin* v. *Shedd*, 190 U.S. 508, 509 (1902); *Shiveley* v. *Bowlby*, 152 U.S. 1, 45 (1894); *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Packer* v. *Bird*, 137 U.S. 661 (1891); *Choctaw & Chickasaw Nations* v. *Board of County Commissioners*, 361 F.2d 932, 933 (10th Cir., 1966); *Choctaw & Chickasaw Nations* v. *Seay*, 235 F.2d 30, 35 (10th Cir., 1956); *Herron* v. *Choctaw & Chickasaw Nations*, 228 F.2d 830, 832 (10th Cir., 1956); *United States* v. *Elliott*, 131 F.2d 720, 723 (10th Cir., 1942); *Shore* v. *Shell Petroleum Corp.*, 55 F.2d 696, 902, aff'd 60 F.2d 1, 2 (10th Cir., 1932); *United States* v. *Hayes*, 20 F.2d 873, 889-890 (8th Cir., 1927) cert.den 275 U.S. 555; *United States* v. *Heinrich*, 12 F.2d 938, 939 (D.Mont., 1926). While as pointed out in *United States* v. *Oregon*, 295 U.S. 1, 27-28 (1935), the construction of federal grants is initially a federal question the federal courts traditionally defer to state rules of construction. Under state law, of course, Montana would own the bank and shore to *low-water mark*. See, e.g., Section 67-712 and Section 89-601, Revised Codes of Montana, 1947; *Fawcette* v. *Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646 (1928); *C. F. Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921); *Gibson* v. *Kelly*, 15 Mont. 417, 422, 39 P. 517 (1895).

[14] Compare *Oregon* v. *Corvallis Sand & Gravel Co.*, *supra*, 50 L.Ed.2d, at 564 and *Shiveley* v. *Bowlby*, 152 U.S. 1, 57-58 (1893).

Montana state law then becomes controlling as to whether the grant to Muskrat, the original Indian allottee, extended to either high or low water mark. Montana law categorically declares that the owner of land riparian to navigable waters owns to low water mark. Section 67-712 and Section 89-601, Revised Codes of Montana, 1947; *Fawcette* v. *Dewey Lumber Co.*, 82 Mont. 250, 266 P. 646 (1928); *C. F. Mettler* v. *Ames Realty Co.*, 61 Mont. 152, 201 P. 702 (1921); *Gibson* v. *Kelly*, 15 Mont. 417, 422, 39 P. 517 (1895).

> "*Except where the grant under which the land is held indicates a different intent*, the owner of the land, when it borders upon a navigable lake or stream, *takes to the edge of the lake or stream at low-water mark;* when it borders upon any other water, the owner takes to the middle of the lake or stream." Section 67-712 (Emphasis supplied)

The patent to Muskrat "indicates (no) different intent."[15]

Since the United States, in the agreed facts, failed to establish Finch's line invaded the Big Horn River below low water mark, obviously it has failed to prove an essential fact to conviction.

[15] The granting clause in Muskrat's patent states:

> "NOW KNOW YE That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said claimant and to the heirs of the said claimant the Land above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature, thereunto belonging, unto the said claimant and to the heirs and assigns of the said claimant forever, and there is reserved from the lands hereby granted a right of way thereon for ditches or canals constructed by the authority of the United States."

CONCLUSION

For the above reasons, certiorari should be granted.

RESPECTFULLY SUBMITTED this —— day of April, 1977.

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